ALLEN LICHTENSTEIN, NV BAR 03992
MARGARET A. MCLETCHIE, NV BAR 10931
LEE B. ROWLAND, NV BAR 10209
JUDY C. COX, NV BAR 11093
AMERICAN CIVIL LIBERTIES UNION OF NEVADA
732 S. 6th St. Suite 200A
Las Vegas, NV 89101
Telephone 702-366-1536
Facsimile 702-366-1331
*Attorneys for DOES 1 - 4*

**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

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| DOES 1 – 4,<br><br>Plaintiffs,<br><br>vs.<br><br>United States Attorneys, District of Nevada,<br><br>Defendants. | Case No. 2:09-cv-01083-KJD-PAL<br><br>**DOES' Motion for Recusal of Judge Kent J. Dawson** |

Come now Intervenors, DOES 1-4, by and through the undersigned counsel, and hereby submit this Motion for Recusal of Judge Kent J. Dawson. This motion is based on the attached Memorandum of Points and Authorities, all pleadings on file in the case, and any further argument as may be permitted by the court.

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. INTRODUCTION

On June 16, 2009, the intervenors, DOES 1 – 4, filed a Motion to Intervene, Motion to Quash, and Motion for Protective Order to prevent the Las Vegas Review-Journal ("LVRJ") from complying with a subpoena (the "First Subpoena") issued on June 1, 2009 by Assistant

U.S. Attorney Gregory Damm ("AUSA Damm"). The First Subpoena sought personal information from the LVRJ about people who had posted comments on its website regarding an article about AUSA Damm's prosecution of Robert Kahre for tax evasion. Most of these comments were critical of AUSA Damm as well as the government. DOES 1 – 4 are individuals who posted comments and believe that their personal information should not be given to AUSA Damm because doing so will have a chilling effect on their First Amendment right to free speech. A Second Subpoena was issued on June 16, 2009 and DOES filed Amended Motions to Intervene, Quash, and for Protective Order on June 22, 2009.

This matter has been assigned to Judge Dawson, but this Court should instead recuse himself in the interest of maintaining judicial integrity. Section 455 of Title 28 U.S. Codes set out the requirements for recusal. Under Section 455(a), a judge must recuse himself if "his impartiality might reasonably be questioned." Based on Judge Dawson's history with both anti-taxation supporters similar to DOES in this case as well as Robert Kahre, the defendant in the tax case regarding which comments were posted on the LVRJ website, recusal is appropriate under Section 455. Thus, DOES respectfully request recusal of Judge Dawson. DOES do not contend that Judge Dawson is in fact biased against them, only that given his history, the possibility of an appearance of bias warrants recusal to preserve judicial integrity.

In 2005, Judge Dawson presided over another tax evasion case involving Irwin Schiff. During the trial, Judge Dawson felt intimidated by supporters of Mr. Schiff to the point that federal marshals were required for his safety. DOES are the subject of a subpoena because they have also allegedly made intimidating comments against officials involved in a tax-evasion case. Given that Judge Dawson has been the target of people who may be viewed as similar to DOES and part of the same anti-tax movement, it is reasonable for an objective observer to question his impartiality when the adverse party in the case is trying to obtain identifying information about these individuals. Here, the very question raised by the government's subpoenas is whether certain comments by tax protesters rise to the level of genuine threats. The fact that Judge Dawson has personally felt threatened by similar comments and by tax protester like the commenters urges recusal under Section 455.

Judge Dawson's history with Mr. Kahre also urges recusal under Section 455. Judge Dawson acknowledged the possible appearance of bias regarding Mr. Kahre and recused himself from AUSA Damm's case against Mr. Kahre. DOES in this case are supporters of Mr. Kahre. Thus, it is reasonable to question Judge Dawson's impartiality towards DOES. Based on the history between Mr. Kahre and Judge Dawson, reasonable observers may raise the possibility of bias against DOES who are now being targeted by AUSA Damm because of their strong support of Mr. Kahre. Once bias is reasonably questioned, Judge Dawson should recuse.

For these reasons, DOES respectfully request that Judge Dawson be recused. Further, given that compliance with the Second Subpoena is slated for June 23, 2009, (Second Subpoena, attached as Ex. 5 to DOES' Amended Motions to Intervene, Quash, and for Protective Order), DOES also respectfully request that the underlying subpoenas at issue be temporarily quashed pending resolution of this matter so that there is ample time to address their claims that the subpoenas violate their rights, and so that their rights are not further harmed by the fact that they are hereby seeking recusal, which will delay the Court's ability to resolve the motions.[1]

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[1] Counsel for DOES have requested, via letter, that the parties extend the compliance date but have not received any response. A true and correct copy of the letter is attached as Exhibit 1.

## II. FACTUAL AND PROCEDURAL HISTORY

As detailed in DOES' Amended Motion to Intervene, Motion to Quash, and Motion for Protective Order, on May 26, 2009, the LVRJ published a story about an ongoing tax evasion trial against Mr. Kahre in which AUSA Damm served as a prosecutor. Joan Whitely, *Employer's Gold, Silver Payroll Standard May Bring Hard Time*, Las Vegas Review-Journal, May 26, 2009, *available at* http://www.lvrj.com/news/46074037.html (last visited June 19, 2009), attached as Ex. 4 to DOES' Amended Motions to Intervene, Quash, and for Protective Order. On the LVRJ's website, readers began posting comments about the article. Many sided with Mr. Kahre and made negative comments towards AUSA Damm, the jurors in the case, and the I.R.S. and federal government in general. In response, AUSA Damm issued a subpoena on June 2, 2009 asking for the LVRJ to turn over all records pertaining to the postings, including "full name, date of birth, physical address, gender, ZIP code, password prompts, security questions, telephone numbers[,] . . . other identifiers . . . [and] the IP address."[2]

Upon learning of the subpoena, DOES filed a Motion to Intervene, Motion to Quash, and Motion for Protective Order because they believed that allowing the LVRJ to give their personal information to AUSA Damm would chill their First Amendment right to free speech. A second subpoena was issued on June 16, 2009 and DOES filed an Amended Motion to Intervene, Motion to Quash, and Motion for Protective Order on June 22, 2009. Their original motions are before Judge Dawson.

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[2] The intervenors do not have a copy of the subpoena, but its nature and scope are described in an op-ed criticizing the subpoena written by Thomas Mitchell, the Editor of the LVRJ, and published on Sunday, June 7, 2009, attached as Ex. 2 to DOES' Amended Motions to Intervene, Quash, and for Protective Order.

## III. ARGUMENT

"The power and the prerogative of a court to [resolve disputes] rest . . . upon the respect accorded to its judgments. The citizen's respect for judgments depends . . . upon the issuing court's absolute probity. Judicial integrity is, in consequence, a state interest *of the highest order*." *Republican Party of Minn. v. White*, 536 U.S. 765, 793 (2002) (Kennedy, J., concurring) (emphasis added).[3]

Section 455(a) of Title 28 U.S. Codes reads: "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. This means that the standard for recusal is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Studley*, 783 F.2d 934, 939 (9th Cir. 1986) (quoting *Mayes v. Leipziger*, 729 F.2d 605, 607 (9th Cir. 1984)). The provisions of § 455(a) require recusal "only if the bias or prejudice is directed against a party and stems from an extrajudicial source." *Sibla*, 624 F.2d at 869 (quoting *United States v. Carignan*, 600 F.2d 762, 764 (9th Cir. 1979)). Circumstances in Judge Dawson's history meet the requirements for recusal under Section 455(a) because a reasonable person would question his impartiality.

### a. Judge Dawson Should Recuse Himself Under Section 455(a) of Title 28 of the U.S. Codes Because He has also been the Target of Anti-Taxation Supporters in the Past.

In 2005, Judge Dawson presided over the trial of Irwin Schiff in a tax evasion case. (Case No. 2:04-CR-00119-1.) During the trial, Schiff supporters allegedly harassed federal officials, including Judge Dawson. Casey Sanchez, *Return of the Sovereigns: Resurgence of Far-Right Movement Reported*, Intelligence Report, Spring 2009, *available at* http://www.splcenter.org/intel/intelreport/article.jsp?aid=1001 (last visited June 18, 2009), attached as Exhibit 2. Judge Dawson himself has spoken of the harassment and intimidation that occurred during the Schiff trial, which rose to such a degree that Judge Dawson and his wife obtained protection from federal marshals. (Ex. 2.) In this case, AUSA Damm has issued a subpoena for information on those who threatened prosecutors and jurors in his tax evasion case.

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[3] The importance of maintaining judicial integrity is highlighted by the fact that two separate United States Codes provide guidance on the subject of recusal. *See* 28 U. S. C. §§ 144, 455.

Since Judge Dawson has been the target of a group of tax protestors who share similarities with DOES, it is reasonable to question whether or not Judge Dawson can maintain an appearance of impartiality regarding DOES. Indeed, the issue in this case is whether or not the intervenors' comments on the LVRJ website were genuinely threatening enough that a subpoena for their personal information was justified. Since Judge Dawson has experienced threats from a similar group of people to the point where he acquired protection from federal agents, observers may question his impartiality in determining whether or not the threshold for justifying the subpoena has been met.

The appearance of prejudice that has been created satisfies both requirements for recusal. First, it is personal towards DOES because they are reminiscent of people who threatened Judge Dawson in a previous case. Second, the appearance of prejudice arises from circumstances outside of Judge Dawson's participation in the current case.

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**b. Judge Dawson Should Recuse Himself Under Section 455(a) of Title 28 of the U.S. Codes Because of His History with Robert Kahre.**

Though Mr. Kahre is not a party to this case, the entire set of circumstances surrounding the subpoena and subsequent motion to quash and issue a protective order is intertwined with AUSA Damm's case against Kahre, thus supporting Judge Dawson's recusal. The fundamental issue in this case is whether or not the people against whom the subpoena has been issued should be allowed to intervene and protect their First Amendment rights. Their comments on the LVRJ website were pro-Kahre and against the government prosecution. As such, Judge Dawson's relationship with Mr. Kahre is relevant for determining recusal.

Regarding Judge Dawson's relationship with Mr. Kahre, Judge Dawson previously recused himself in the government's prosecution of Mr. Kahre. (*United States v. Kahre*, CR-S-05-0121-KJD-(RJJ), Doc. 130, attached as Exhibit 3.) This act demonstrates that Judge Dawson himself has recognized the possibility of an appearance of bias against Mr. Kahre. Given the previous recusal, it would be reasonable to question whether or not Judge Dawson can maintain impartiality when faced with supporters of Mr. Kahre, especially when they are trying to stop a subpoena issued by the AUSA prosecuting Mr. Kahre. Under the circumstances, the prejudice against DOES is still personal and extra-judicial. It is personal because Judge Dawson is adjudicating a dispute between those who support Mr. Kahre, against whom Judge Dawson has admitted he could appear biased, and those who are prosecuting Mr. Kahre. As such, there is an appearance of personal bias against DOES if Judge Dawson might favor AUSA Damm over them. This bias also stems from an extra-judicial source, namely Judge Dawson's history with Mr. Kahre.

The United States Supreme Court has said that while "what degree or kind of interest is sufficient to disqualify a judge from sitting 'cannot be defined with precision[,]'" *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)), it is important that the test have an objective component. If the question of recusal is a close one, "the balance tips in favor of recusal." *United States v. Holland*, 519 F.3d 909, 912 (9th Cir. 2008) (citing *United States v. Dandy*, 998 F.2d 1344, 1349 (6th Cir. 1993)). Based on the circumstances in this case, an objective observer could reasonably question whether or not Judge Dawson is biased against DOES, which justifies recusal.

## IV. CONCLUSION

For the reasons stated above, this Motion for Recusal of Judge Dawson should be granted. Further, the subpoenas should be temporarily quashed (or the compliance date extended) so that DOES' rights can fairly and completely be adjudicated.

Respectfully submitted, this 22nd day of June, 2009,

By: /s/ *Margaret A. McLetchie*

Margaret A. McLetchie
Nevada Bar No. 10931
**ACLU OF NEVADA**
732 S. Sixth Street, Suite 200A
Las Vegas, NV 89101
(702) 366-1902
*Attorney for DOES 1-4*